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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/578,032	05/02/2006	Gerhard Nuspl	STOLMAR-0009	8138

7590 02/17/2010

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EXAMINER	
LANGEL, WAYNE A	
ART UNIT	PAPER NUMBER
1793	

MAIL DATE	DELIVERY MODE
02/17/2010	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No.	Applicant(s)	
	10/578,032	NUSPL ET AL.	
	Examiner	Art Unit	
	Wayne Langel	1793	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE *3* MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *28 December 2009*.

2a)☐ This action is **FINAL**. 2b)☒ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1-6,8-26,28-31 and 36-44* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *1-6,,8-26,28-31 and 36-44* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☐ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO/SB/08) Paper No(s)/Mail Date _____.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____ .
5) ☐ Notice of Informal Patent Application
6) ☐ Other: _____.

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

> A person shall be entitled to a patent unless –
>
> (e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

Claims 41-44 are rejected under 35 U.S.C. 102(e) as anticipated by or, in the alternative, under 35 U.S.C. 103(a) as obvious over Wurm et al ‘024 or Barker et al ‘026 or Barker et al ‘935, for the reasons given in the last Office Action. Applicants’ argument, that the PTO must provide a basis in fact and/or technical reasoning to reasonably support the determination that an allegedly inherent characteristic is necessarily present from the teachings of the prior art, is not convincing. Barker et al ‘026, for example, discloses in Example 7 that the lithium iron phosphate pellet was “powderized”. It would be expected that the powder resulting from such powderization step would have a particle size distribution such that 90% of the particles would be of a size of less than 3.0 microns, sinced 3.0 microns is not exceptionally small for powder. In any event, it would be obvious to subject the lithium metal phosphates formed according to the process of Wurm et al ‘024, Barker et al ‘026 or Barker et al ‘935 to

classification or separation step to form particles having a particle size distribution such that 90% of the particles have a size of less than 3.0 microns, since one of ordinary skill in the art would recognize that any suitable particle size distribution could be achieved with such conventional classification techniques.

The following is a quotation of the second paragraph of 35 U.S.C. 112:

> The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 1-6, 8-26, 28-31 and 36-44 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. In claim 1, it is indefinite as to whether a precursor mixture or a precursor suspension is formed, since line 3 recites "producing a precursor mixture", whereas line 6 recites "thereby to produce a precursor suspension" In lines 7 and 9, there is no clear antecedent basis for "the precursor mixture or suspension", since it is not clear whether a mixture or suspension is formed in step (a), or whether a mixture or a suspension could be formed. In line 9, it is indefinite as to whether "the precursor or suspension" would necessarily be the precursor or suspension resulting from step (b), or whether it could be the precursor or suspension resulting from step (a). In claims 4, 15 and 16, the recitation of "selected from…and" is improper Markush terminology. In claim 24, the recitation of "a dispersing apparatuses from…or" is ungrammatical and therefor indefinite. In claims 24 and 37, "such as" renders the scope of the claims vague and indefinite, since it is not clear whether the injection nozzles (claim 24) or the sugar or cellulose (claim 37) is required,

or whether nthe claims embrace any mixing nozzle or carbon precursor material, respectively. In claim 41, there is no antecedent basis for “said particle aggregates”.

Claims 1-6, 8-26, 28-31 and 36-40 are rejected under 35 U.S.C. 103(a) as being unpatentable over Wurm ‘024 in view of either Barker et al ‘026 or Barker et al ‘935, for the reasons given in the last Office Action. Applicants’ argument, that the npresent invention is based on the discovery that the use of the dispersing/milling step to produce a D90 less than 50 microns, coupled with hydrothermal treatment, results in a material which produces not only small particle size but also a small particle size distribution, is not convincing, since the claims do not require that the reaction under hydrothermal conditions recited in step (c) be with respect to the precursor mixture or suspension formed in step (b)..

This application apparently discloses allowable subject matter.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Wayne Langel whose telephone number is 571-272-1353. The examiner can normally be reached on Monday through Friday, 8 am - 3:30 pm Eastern Time.

If attempts to reach the examiner by telephone are unsuccessful, the examiner’s supervisor, Stanley Silverman can be reached on 571-272-1358. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Wayne Langel/
Primary Examiner, Art Unit 1793

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